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inquire into the validity of the reference and dismissed the application.

Babu *Sital Prasad Ghosh*, for the applicant.

The opposite parties were not represented.

AIKMAN, J.—This is an application for revision of an order of the learned Munsif of Rasra, dismissing an application under section 525 of the Code of Civil Procedure on the ground that as the opposite party objected to the validity of the reference, he had no jurisdiction to entertain the application. The view taken by the learned Munsif is wrong, as he will see by referring to the cases *Amrit Ram v. Dasrat Ram* (1), *Mahomed Wahid-ud-din v. Hakimian* (2) and *Manilal Hargovandas v. Vanmali-das Amrat Lal* (3). As the Munsif failed to exercise a jurisdiction vested in him by law, I set aside his order dismissing the application. I direct him to restore the application to the list of pending applications under its original number on the register and dispose of it on the merits. No one appears in this Court on behalf of the opposite side. The costs incurred by the applicant, Ganesh Singh, in this Court will be costs in the cause.

APPELLATE CIVIL.

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April 19.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Know.

SAKHAWAT HUSAIN (DEFENDANT.) v. GAJADHAR PRASAD
AND OTHERS (PLAINTIFFS).*

*Mortgage—Construction of document—Covenant for payment by instalments—
Effect of waiver of right to exact penalty for breach of covenant.*

Where a mortgagee had not, on the mortgagor's failure to make regular payments, proceeded to cancel the arrangement for payment by instalments, but had accepted irregular payments, and then the mortgagor made further default, held the mortgagee could not on such further default sue to set aside the whole arrangement *ab initio*, but was only entitled to the balance of the principal together with interest from the date of the last instalment held to be satisfied. *Radha Prasad Singh v. Bhagwan Rai* (4), followed.

A mortgage-deed of November 26th, 1888, secured Rs. 1,500 principal payable by annual instalments of Rs. 300 each, and further

* Second Appeal No. 1236 of 1904, from a decree of A. Sabonadiere, Esq., Additional Judge of Allahabad, dated the 12th of July, 1904, confirming a decree of Pandit Raj Nath, Subordinate Judge of Allahabad, dated the 18th of July, 1903.

(1) (1894) I. L. R., 17 All., 21.

(2) (1898) I. L. R., 25 Cal., 707.

(3) (1905) I. L. R., 29 Bom., 621.

(4) (1883) I. L. R., 5 All., 289.

provided that the mortgagee might cancel the arrangement as to instalments upon failure by the mortgagor to pay any instalment. Payments were made most irregularly, the last payment of Rs. 470 bringing that total up to Rs. 900, being made on July 26th, 1892. No more was paid, except Rs. 135, which was expressly paid as interest only. On suit (29th June, 1903) by the mortgagee the Court of first instance (Subordinate Judge of Allahabad) gave the plaintiff a decree setting aside the instalment arrangement *ab initio*, and the lower appellate Court (District Judge of Allahabad) dismissed the appeal. The defendant thereupon appealed to the High Court.

Maulvi *Rahmat-ullah*, for the appellant.

Munshi *Jang Bahadur Lal*, for the respondents.

STANLEY, C.J. and KNOX, J.—This is an appeal from a decree directing the sale of lands belonging to the defendant appellant for the realization of the amount stated to be due to the plaintiffs respondents on foot of three mortgage-deeds which are stated in the plaint. The question before us arises upon the language of one of these mortgages, namely, a mortgage of the 26th of November, 1888, to secure a principal sum of Rs. 1,500 payable by annual instalments of Rs. 300 each without interest. According to the mortgage-deed if the instalments had been duly paid the debt would have been discharged on the 29th of November, 1893. The deed contains a covenant on the part of the mortgagor substantially to the following effect, that if the mortgagor failed to pay any annual instalment in whole or in part, then the mortgagees should be at liberty to cancel the arrangement as to the payment by instalments and should have the right thereupon to realize the amount due from the person and also from the property of the mortgagor including the hypothecated property with interest at the rate of 9 per cent. per annum. The instalments were not punctually paid; on the contrary we find that payments on foot of the mortgage were made most irregularly, as appears from the account appended to the plaint. These payments are also endorsed upon the mortgage-deed. We find that on the 26th of July, 1892, a sum of Rs. 470 was paid. This sum and the sums previously paid amount in the aggregate to Rs. 900, that is, to the three

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instalments which were payable before and up to the 26th of November, 1891. Now it is obvious that the plaintiffs mortgagees did not exercise the option which they had under the document of enforcing payment of their mortgage debt on breach of the covenant entered into by the mortgagor for punctual payment of the instalments which became payable on the 26th of November, 1889, 26th of November, 1890 and the 26th of November, 1891. Instead of proceeding for the recovery of their debt, as they might have done, they accepted the irregular payments to which we have referred and waived their right to cancel the arrangement entered into for payment by instalments. Therefore on the 26th of July, 1892, two instalments only of Rs. 300 each remained due, that is, Rs. 600. From that time forward no payment on foot of principal has been made, but a payment of Rs. 135 was made. This sum was not appropriated to the payment of principal, but, as appears by an acknowledgment signed by the mortgagor on the mortgage-deed, was paid for interest. The Courts below held that by reason of the irregularity in the payments made by the mortgagors the mortgagees are now entitled in this suit to recover interest at the rate of 9 per cent. upon the principal amount of the mortgage from its date; that is, that the mortgagees can enforce the option which was given to them of cancelling the arrangement as to the payment by instalments *ab initio* and enforcing their power of realizing their money with interest. We cannot accept this view. It is clear that the mortgagees accepted the irregular payments as payments made in satisfaction of the covenant of the mortgagor and they must be, we think, taken under the circumstances to have waived their right to enforce the penalty which they had an option to enforce under the document. If authority were needed for this, it is to be found in the case of *Radha Prasad Singh v. Bhagwan Rai* (1). We must allow this appeal and modify the decree of the Courts below in regard to the sum found to be payable under the mortgage of the 26th of November, 1888. The sum which is now properly payable under that document is the principal sum of Rs. 600 with interest at the rate of 9 per cent. per annum from the 26th of November, 1891, up to the date

(1) (1883) I. L. R., 5 All., 280.

of payment after allowing credit for the sum of Rs. 135 already paid for interest. The decree must be modified accordingly. The amount due on the mortgage of the 26th of November, 1888, will be calculated in the office on the basis which we have indicated and the total amount to which the plaintiffs respondents are entitled will be modified accordingly. We extend the time for payment of the sum which shall be ascertained to be due up to the 20th of July, 1906. The appellant is entitled to his costs of this appeal. As regards the costs in the Courts below the parties will pay and receive costs proportionate to failure and success.

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Before Sir John Stanley, Knight, Chief Justice.

BALLI PANDE v. CHITTAN AND ANOTHER.*

Criminal Procedure Code, sections 250, 423(1)(d).—Fivolous complaint—Compensation—Appeal—Power of appellate Court.

Held that an appellate Court is not empowered to grant compensation under section 250 of the Code of Criminal Procedure in view of the express terms of section 250—"Magistrate by whom the case is heard." Section 423(1)(d) cannot be taken to confer such power.

In this case on the complaint of Balli Pande two persons Chittan and another were tried by a Magistrate of the third class for offences under sections 426 and 352 of the Indian Penal Code, and were convicted and sentenced to small fines. On appeal the District Magistrate of Azamgarh set aside the convictions and sentences, and, being of opinion that the charge brought by Balli was frivolous, ordered the complainant to pay Rs. 10 as compensation to the two accused. The District Magistrate purported to act under section 250 of the Code of Criminal Procedure. Balli applied to the Sessions Judge for revision of this order, who, being of opinion that section 250 was not available to an appellate Court, submitted the record of the case to the High Court for orders under section 438 of the Code of Criminal Procedure.

The Assistant Government Advocate (Mr. W. K. Porter) in support of the order.

STANLEY, C.J.—This case comes before the Court on a reference by the learned Sessions Judge of Azamgarh, recommending that an order for compensation passed by the District Magistrate

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* Criminal Reference No. 178 of 1906.